80-6232

No.

Office-Supreme Court, U.S.
FILED
APR 27 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT BORIS BEACHBOARD

Appellant,

v.

COLUMBIA UNIVERSITY

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

DAVID I. SHIVITZ
Attorney for Appellee
11 East 44th Street
New York, New York 10017
(212) 867-1600

(10936)

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MAY IT PLEASE THE COURT:

I

OBJECT

The object of this motion is to dismiss Appellant's appeal in this case for the following reasons:

1. The New York Court of Appeals decision involved no federal question.

2. The federal question sought to be reviewed was neither raised nor passed on by the New York Court of Appeals and is not substantial.

3. The New York Court of Appeals decision rested on an adequate non-federal ground.

4. The appeal seeks a review on a hypertechnical argument that a rule of the New York Court of Appeals providing for sua sponte dismissal for lack of jurisdiction was improperly adopted notwithstanding that apart from any rule, that court had the inherent power to consider its jurisdiction.

5. Since there is no basis in law or in fact for this appeal, acceptance of jurisdiction would be a waste of the Court's time and effort.

STATEMENT OF FACTS

Appellant's Jurisdictional Statement is confusing and incomplete.

In 1979, Appellant commenced an action in the Supreme Court, New York County, pursuant to Article 78 of the New York Civil Practice Law and Rules to review the determination of Appellee, Columbia University, for having rejected Appellant as a graduate student for the fifth time. That proceeding was dismissed as being time-barred under the relevant New York statute of limitations. Again in 1979, Appellant, having applied for and been rejected as a student for the sixth time, commenced a second Article 78 proceeding which was also dismissed for the reason that the issue had already been determined in the first proceeding (Appendix G to Appellant's Jurisdictional State-

ment). Appellant appealed the decision of the Supreme Court, New York County, dismissing the proceedings to the Appellate Division of the Supreme Court. That court granted the motion of Appellee to dismiss the appeal.

Under Section 5602 of the New York Civil Practice Law and Rules, an appeal may be taken to the highest court of the state, the New York Court of Appeals, without permission of that court if the order of the Appellate Division involved the construction of the constitution of the State of New York or of the United States. Absent that constitutional issue and several other exceptions not relevant herein, permission of the Appellate Division or the Court of Appeals is required. In the proceedings below, Appellant sought permission of the Appellate Division for leave to

appeal to the Court of Appeals. That application was denied. The Court of Appeals likewise denied leave to appeal. It was only then that Appellant filed a jurisdictional statement with the New York Court of Appeals, which jurisdictional statement is attached hereto as Appendix "1".

It is to be noted that nowhere in the jurisdictional statement filed with the New York Court of Appeals does Appellant allege that the order of the Appellate Division involves the construction of either the United States or the New York State constitutions.

Upon receipt of Appellant's Jurisdictional Statement, the Clerk of the Court of Appeals wrote to Appellant on July 15, 1980 informing the Appellant that the Court of Appeals "...may examine its subject matter jurisdiction sua sponte

..." and gave Appellant the right to set forth in a letter his comments "justifying the retention of subject matter jurisdiction." A copy of the July 15, 1980 letter of the Clerk of the New York Court of Appeals is attached as Appendix "2". Appellant did give his reason why the New York Court of Appeals had jurisdiction (Appendix "3" hereto) which basically consisted of the bald allegation that the aforesaid section 5602 permitted it. On September 16, 1980 the New York Court of Appeals dismissed his appeal sua sponte upon the ground that no substantial constitutional question was directly involved (Appendix A of Appellant's Jurisdictional Statement).

On October 27, 1980, Appellant brought on a motion before the New York Court of Appeals seeking an order vacating the aforesaid sua sponte dismissal. A

copy of the affidavit in support of that motion, less exhibits, is attached as Appendix "4". Once again, we note that nowhere in that affidavit does Appellant allege that any of his rights under the New York or United States constitutions were violated. Thus, the subject Jurisdictional Statement is the very first time in which Appellant raises a question of violation of any of his federal rights.

II

WHY THIS APPEAL SHOULD BE DISMISSED

THE NEW YORK COURT OF APPEALS NEVER WAS ASKED TO RULE UPON NOR DID IT RULE UPON ANY CLAIM OF A VIOLATION OF THE CONSTITUTION, TREATIES OR LAWS OF THE UNITED STATES

The appeal is not within the jurisdiction of this Court. The sole basis for this appeal as stated on page 28 of Appellant's Jurisdictional Statement is

28 U.S.C. 1257(2). That section states:

> "1. Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> 2. By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

As indicated above, neither the jurisdictional statement filed by Appellant with the New York Court of Appeals, nor the Court of Appeals sua sponte dismissal nor Appellant's motion to vacate the dismissal even alleges any state law being repugnant to any federal right. That being the case this Court lacks jurisdiction to entertain the Appeal.

As this Court observed in Wilson v. Cook, 327 U.S. 474, 480, 66 S.Ct. 663

(1946):

> "The purpose of this requirement is to restrict our mandatory jurisdiction on appeal, Memphis Gas Co. v. Beeler, 315 U.S. 649, 651 and to make certain that no judgment of a state court will be reviewed on appeal by this Court unless the highest court of the state has first been apprised that a state statute is being assailed as invalid on federal grounds, Charleston Assn. v. Alderson, 324 U.S. 182, 185-6 and cases cited, or, when the statute as applied, is so assailed, unless it has opportunity authoritatively to construe it. Fiske v. Kansas, 274 U.S. 380, 385 and cases cited."

Even if Appellant had raised a constitutional argument upon his motion to vacate the dismissal of his appeal, such a motion would have come too late, unless the Court of Appeals actually entertained the question and decided it. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029 (1975).

III

EVEN IF A FEDERAL QUESTION HAD BEEN RAISED BELOW, IT COULD NOT HAVE BEEN SUBSTANTIAL AND THE DECISION OF THE NEW YORK COURT OF APPEALS RESTED ON ADEQUATE NON-FEDERAL GROUNDS

Appellant herein now belatedly attempts to raise the issue of the validity of Rule 500.1 (22 N.Y.C.R.R. Part 500) of the New York Court of Appeals. It is challenged herein on the ground that an amendment to the rule which merely codified the right to the Court of Appeals to dismiss an appeal for lack of jurisdiction, sua sponte was not published in "The New York Bulletin," a publication of the New York Department of State. Appellant contends that due to the lack of publication in that particular journal, the rule as applied to him, was invalid. This he now contends for the first time, deprived him of his Constitutional rights.

The amendment to Rule 500.2 was duly published and available to the Appellant. He was in no way deprived of notice or hearing to substantiate what is contended to be the federal question presented.

Appellant cites Herring v. New York, 422 U.S. 853, 95 S.Ct. 2550 (1975), which held that the Sixth Amendment's guaranty of assistance of counsel was violated by a New York statute which conferred upon the trial judge in a non-jury criminal trial the power to deny counsel any opportunity to make a closing summation.

In the case at bar the Appellant contends:

> "The Rule by which the Albany Court dismissed the case brought to it by the appellant herein, was not duly published as prescribed by legislation and as a result has not yet taken effect." (Appellant's Jurisdictional Statement at 39.)

Unlike the Herring case, there is no challenge here to the content of the rule of the New York Court of Appeals. Rather, Appellant contends that due to an alleged defective publication of a revision to the rule, he was denied the procedural due process guarantee of a hearing when his appeal was dismissed sua sponte, upon the ground that no substantial constitutional question was directly involved.

Even without the rule, above cited, the power of the court to proceed sua sponte is an inherent one. As this Court has stated:

> "It is an inherent power of courts to make their own rules." Hanna v. Mitchell, 196 N.Y.S. 43, 202 App. Div. 504 (1922).
>
> "...the rule, springing from the nature and limits of the judicial power of the United States is inflexible and without exception, which requires this court, of its own motion, to deny its own juris-

> diction and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act." Mansfield, C. & L.M.R. Co. v. Swan, 111 U.S. 379, 4 S.Ct. 510, 28 L.Ed. 462, 464 (1884).

It has been held that a court has a duty to raise the issue of jurisdiction on its own motion. Muse v. Mellin, 212 F.Supp. 315 (1962).

And a court must be ready to determine sua sponte, whether it has jurisdiction over a cause presented to it. Kaz Manufacturing Co. v. Chesebrough-Pond's, Inc., 211 F.Supp. 815 (1962).

In New York it has been held that any court may refuse, on its own motion, to proceed with a cause when its lack of jurisdiction is apparent. People v. Arez, 314 N.Y.S.2d 504, 64 Misc.2d 723 (1970).

As this Court has the power and

the duty to act sua sponte, on its own subject matter jurisdiction so the New York Court of Appeals has that inherent authority and obligation under the Constitution of the State of New York and indeed has so acted for over one hundred years.

It is well established that:

> "Under the Inherent Powers Doctrine a court has all powers reasonably required to enable it to perform efficiently its judicial functions, to protect its dignity, independence and integrity, and to make its lawful actions effective. These powers are inherent in the sense that they exist because the court exists; the court is, therefore, it has the powers reasonably required to act as an efficient court. Inherent judicial power is derived not from legislative grant or specific constitutional provisions, but from the fact that it is a court which has been created, and to be a court requires certain incidental powers in the nature of things." (Carrigan, J.R., Inherent Powers of the Courts, National College of the State Judiciary, Reno, Nevada, at 11 [1973].)

The inherent power to revise and publish a court rule is supplemented, not diminished, by state law. The relevent Constitutional provision in this instance is New York Constitution Article IV §8:

> "No rule or regulation made by any state department, board, bureau, officer, authority or commission, except such as relates to the organization or internal management of a state department, board, bureau, authority or commission, shall be effective until it is filed in the office of the Department of State. The legislature shall provide for the speedy publication of such rules and regulations by appropriate laws."

The New York Court of Appeals filed the amendment to Rule 500.02 with the Secretary of State on October 25, 1976 and the amendments were subsequently published by the Secretary of State in the New York Code of Rules and Regulations. Their effective date as noted in the Code was January 1, 1977.

In 1980, when Appellant sought redress from the New York Court of Appeals, the revision to Rule 500.2 was thus in official and readily available form. He was also given specific and personal notice of the court's rules by letter from the Clerk of the Court of Appeals (Appendix "2" hereto). This provided fair and actual notice of their contents and potential effect on him. He thereafter brought on his motion to vacate the sua sponte dismissal (Appendix "4" hereto).

A similar situation existed in People v. Lerner, 394 N.Y.S.2d 514, 90 Misc.2d 513 (1977). The defendant was charged with violating a regulation prohibiting operators and agents of nursing homes from accepting "kick-backs" from suppliers. Defendant contended that because of a failure to publish, the regu-

lation was ineffective. The regulation in question was lawfully adopted and duly filed with the Secretary of State although it remained unpublished. In Lerner, supra, the New York Supreme Court viewed the defendant's contention as without merit, stating:

> "The purpose of the filing requirement is to provide a central location where all rules and regulations may be examined by those who may be effected by them. (People v. Cull, 10 N.Y. 2d 123, 218 N.Y.S.2d 38, 176 N.E.2d 495). The Constitution mandates filing for a regulation to become effective; it does not mandate immediate publication. Realistically, statutes, amendments or regulations can only be published periodically as new editions and supplements are compiled. In any event, a copy of Chapter 414.16 was mailed to the Parkview Nursing Home, the defendant's place of business and he does have actual notice of the regulations." 394 N.Y.S.2d at 517.

As stated above, apart from Appellant's actual notice of the Rule, the Rule

was not only on file with the Secretary of State, but was also published in the official state compilation, the New York Code of Rules and Regulations, by the Secretary of State.

New York State Executive Law

Article VI §102 describes the Code as follows:

> "...Such compilation shall be known as the 'official compilation of codes, rules and regulations of the State of New York.' Such compilation shall presumptively establish the codes, rules and regulations of the State of New York, except such as relate solely to the organization or internal management of a department, board, bureau, authority, commission or other agency of the state, in force and effect on the first day of January, 1945. The official supplements to such compilation published as hereinafter provided shall presumptively establish any changes in such codes, rules and regulations, except such as relate solely to the organization or internal management of a department, board, bureau, authority, commission or other agency of

> the state, affected by addition, amendment or repeal, or adopted during the period ending on the 31st day of December in any year immediately preceding the publication of such supplement."

Rule 500.2 of the New York Court of Appeals as it appeared in the 1980 New York Code of Rules and Regulations was presumptively an official "Rule of Practice" of the Court of Appeals. Appellant was in no way prejudiced by any failure of the Rule change to have been printed in the "New York Bulletin."

Appellant's contention of the ineffectiveness of a rule which was recognized by the New York Court of Appeals and the Secretary of State as being effective for more than three years is based on a slavish adherence to technicalities. Such adherence has been rejected in the State of New York:

> "In following rules of practice for the due and orderly

> administration of the law, care should be taken that justice is not smothered by a too slavish adherence to the mere forms and technicalities of procedure." In re Hodgkins v. Mead, 119 N.Y. 166, 171, 23 N.E. 559, 560 (1890).

Apart from the above, as a practical matter, if the New York Court of Appeals had not acted sua sponte at the time that it did, it would have been required to dismiss the jurisdictionally defective appeal after briefing and arguments on the merits which could not be reviewed.

The Rule which Appellant seeks to challenge is not the source of the authority of the New York Court of Appeals. As indicated above, that authority is derived from the Constitution of the State of New York and from the inherent power of every court. The Rule merely restated the century old authority.

IV

CONCLUSION

It is respectfully submitted that at the time Appellant sought redress from the New York Court of Appeals, Rule 500.2, as revised in 1976, was in effect. Appellant had actual knowledge of the Rule and addressed himself to it.

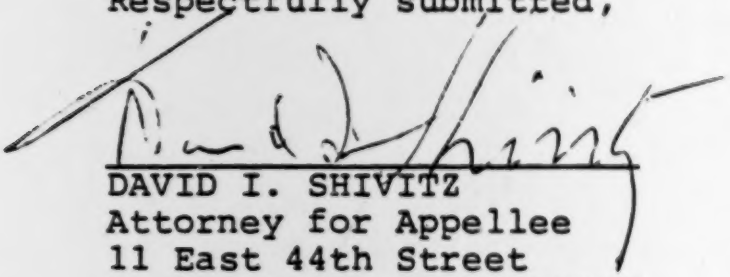
Even without the Rule, which merely articulated the existing authority, it was an inherent power of the New York Court of Appeals to act sua sponte on its own subject matter jurisdiction.

Appellant seeks to bring this appeal where no federal question was raised in the New York Court of Appeals, where no substantial federal question is raised at this time and where he attempts to compel slavish adherence to form above established law.

The appeal should be dismissed with all costs being assessed against Appellant.

IT IS SO MOVED.

Respectfully submitted,



DAVID I. SHIVITZ
Attorney for Appellee
11 East 44th Street
New York, New York 10017
(212) 867-1600

APPENDIX "1"

COURT OF APPEALS OF THE

STATE OF NEW YORK

In the Matter of the Application of	
ROBERT BORIS BEACHBOARD,	
Petitioner-Appellant,	
For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules	JURISDICTIONAL STATEMENT
-against-	
COLUMBIA UNIVERSITY,	
Respondent-Respondent.	

STATE OF NEW YORK

ss.:

COUNTY OF NEW YORK

Robert Boris Beachboard, petitioner-appellant in the above entitled case, being duly sworn, deposes and says:

1. This appeal seeks a review of an order entered regarding this action in and by the Appellate Division of the Supreme Court of the State of New York, First Judicial Department.

2. The subject order was signed on April 22, 1980 and was entered shortly thereafter or upon the same day.

3. Said order with notice of entry was served upon the petitioner-appellant on April 30, 1980 or shortly thereafter upon information and belief.

4. Motion papers for leave to appeal to the Court of Appeals were served upon the respondent-respondent by the petitioner-appellant on May 22, 1980.

5. Replying papers in the aforementioned motion and a notice of appeal were served on the respondent-respondent by the petitioner-appellant on June 2, 1980.

6. An order denying permission to appeal to the Court of Appeals from the order dated April 22, 1980 was signed on June 24, 1980 and was entered on the same day or shortly hereafter.

7. The June 24, 1980 order with notice of entry was served upon the petitioner-appellant on June 30, 1980 or shortly thereafter by mail upon information and belief.

8. Attached are the April 22, 1980 order in question as well as an affidavit/memorandum of the petitioner-appellant in support of a motion heard in the Appellate Division of the Supreme Court of the State of New York, First Judicial Department for leave to appeal to the Court of Appeals which includes the order of Judge Stecher dated October 15, 1979 from which the petitioner-appellant sought leave to appeal on November

16, 1979 and the order/judgment entered in the office of the clerk of the County of New York on December 5, 1979 as well as the notice of appeal dated June 2, 1980.

9. The petitioner-appellant herein asserts that the decision of the Appellate Division of the First Judicial Department granting the cross motion of the respondent-respondent to dismiss the appeal of the petitioner-appellant is in contradiction of recent decisions based upon the same or very similar facts and is inconsistent with the Civil Practice Law and Rules regarding the service of papers. These issues are in need of resolution not only for their own sake but also for the sake of their novelty. This Court has jurisdiction under C.P.L.R., § 5602 (a) 1. (i).

Dated: July 8, 1980.

/s/ Robert Boris Beachboard
Robert Boris Beachboard
John Jay Hall
Columbia University
New York, New York
10027
Tel.: (212) 280-6045

Byron Golden
Attorney for Respondent-Respondent
11 East 44th Street
New York, New York
10017
Tel.: (212) 687-3755

STATE OF NEW YORK
ss.:
COUNTY OF NEW YORK

Robert Boris Beachboard, being duly sworn, deposes and says that he is the petitioner-appellant in the above entitled action; that he has read the foregoing jurisdictional statement and knows the contents thereof and that the same is true to his own knowledge, except as to matters therein stated to be alleged on information and belief, and as to those matters, he believes it to be true.

/s/ Robert Boris Beachboard
Robert Boris Beachboard

Subscribed and sworn to before me this eighth day of July 1980.

HOWARD EPSTEIN
Notary Public,
State of New York
No. 31-6194551
Qualified in
New York County
Commission Expires
March 30, 1982

/s/ Howard Epstein

Notary Public
County of New York
State of New York

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on April 22, 1980

Present--Hon. Francis T. Murphy, Jr., Presiding Justice
Theodore R. Kupferman
Leonard H. Sandler
Vincent A. Lupiano, Justices

In the Matter of the Application of Robert Boris Beachboard, Petitioner-Appellant, For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules, -against- Columbia University, Respondent-Respondent.	Order Granting Cross-Motion to Dismiss Appeal M-1112

An appeal having been taken to this Court by the petitioner-appellant from the judgment of the Supreme Court, New York County entered on December 5, 1979,

And the respondent having cross-moved to dismiss said appeal,

Now, upon reading and filing the notice of cross-motion, with proof of due service thereof, and the papers filed in support of said cross-motion, and the papers filed in opposition or in relation thereto; and due deliberation having been had thereon,

It is ordered that the cross-motion to dismiss said appeal be and the same hereby is granted with $20 costs.

ENTER:

JOSEPH J. LUCCHI

Clerk.

NEW YORK SUPREME COURT
APPELLATE DIVISION:
FIRST DEPARTMENT

In the Matter of the Application of	
ROBERT BORIS BEACHBOARD, Petitioner-Appellant,	SUPPLEMENTAL AFFIDAVIT/ MEMORANDUM UPON MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS
For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules	
-against-	
COLUMBIA UNIVERSITY, Respondent-Appellee.	

STATE OF NEW YORK
ss.:
COUNTY OF NEW YORK

Robert Boris Beachboard, being duly sworn, deposes andsays:

The following is an accurate listing of dates and events upon the information and belief of the appellant.

October 18, 1979: Order dismissing the action with index number 12669/79 signed by Judge Stecher entered in the office of the Clerk of the County of New York. (Exhibit A.)

November 16, 1979: Motion made by petitioner at Special Term, Part I of the Supreme Court of the State of New York, County of New York for leave to appeal to the Appellate Division thereof from said order.

December 5, 1979: Order/judgment dismissing the action with index number 12669/79 signed by Judge Stecher. (Exhibit B.)

December 18, 1979 (upon information and belief): Attprney for respondent served the above mentioned December fifth order upon the

petitioner by mailing a copy of it with a notice of entry to Arvia Hotel for Transients with which the petitioner at that time had no connection.

January 22, 1980: Order dismissing the above mentioned motion signed by Judge Stecher upon the ground that appellant "may appeal as of right" signed.

January 25, 1980: Appellant served upon the attorney for the appellee motion papers returnable at the Appellate Division for leave to appeal to the Appellate Division.

February 14, 1980: Order dismissing the motion the papers for which were served on January 25, 1980 signed at the Appellate Division.

March 6, 1980: Appellee served upon the appellant motion papers

returnable at the Appellate Division for a dismissal of this action upon the grounds that the appeal was untimely.

April 22, 1980: Order dismissing the appeal signed.

In 1978 this court firmly established the precedent that:

> Where ... the final judgment ministerially implements an order granting summary judgment, we have concluded that in the interest of judicial economy the appeal from the order should be deemed an appeal from the subsequent judgment in which the order was subsumed ... and that the appeal should be considered on the merits.
>
> National Bank of North America vs. Michael Kory, 63 A.D.2d 579, 580.

This precedent was more recently affirmed in 1979. French American Banking Corporation vs. Stern, 70 A.D.2d 562 (A.D. 1st). Also Morris Van Slyke vs. Pargan, Inc.,

69 A.D.2d 927 (A.D. 2st); Sprinzen vs. Homberg, 63 A.D.2d 939 (A.D. 1st), rev. 46 N.Y.2d 623, 389 N.E.2d 456; Topik vs. Salzburg, 70 A.D.2d 557 (A.D. 1st); and Pan American World Airways vs. Etsia, 64 A.D.2d 877 (A.D. 1st).

Appellant maintains that the motion made November 16, 1979 is judicially equivalent to a motion made on December 16, 1979 by an order to show cause signed on December 21, 1979 the same as the November 16, 1979 motion except for explicit reference to the December fifth order.

WHEREFORE deponent respectfully requests leave to appeal.

/s/ Robert Boris Beachboard
Robert Boris Beachboard

STATE OF NEW YORK
COUNTY OF NEW YORK

Robert Boris Beachboard, being duly sworn, deposes and says that he is the named appellant in the above entitled action; that he has read the foregoing affidavit/memorandum in support of a motion for leave to appeal to the court of appeals and knows the contents thereof and that the same is true to his own knowledge, except as to matters therein stated to be alleged on information and brlief, and as to those matters, he believes it to be true.

/s/ Robert Boris Beachboard
Robert Boris Beachboard

Subscribed and sworn to before me this second day of June 1980.

HOWARD EPSTEIN
Notary Public,
State of New York
No. 31-6194551
Qualified in
New York County
Commission Expires
March 30, 1982

/s/ Howard Epstein

Notary Public
County of New York
State of New York

SUPREME COURT : COUNTY OF NEW YORK

SPECIAL TERM : PART I

- - - - - - - - - - - - - - - - - X

In the matter of the application of

ROBERT BORIS BEACHBOARD

Petitioner,

for a judgment pursuant to Article 78 of the CPLR

Index 12669/79

- against -

COLUMBIA UNIVERSITY,

Respondent.

- - - - - - - - - - - - - - - - - X

STECHER, J.:

Petitioner, appearing pro se, moves for various relief in this Article 78 proceeding. Among other relief petitioner seeks an order directing respondent to enroll petitioner in a certified degree program in its graduate school of arts & sciences; compelling respondent to

change a grade given to petitioner in a course in respondent's school of general studies; directing respondent to provide petitioner with a letter of reference; enrolling petitioner in a degree program in its school of general studies; cancelling a bill of $71.83 for residence hall expenses; and, for damages in the amount of $50,000. This petition seeks basically the same relief sought by petitioner in a prior action, which was dismissed as being untimely.

Petitioner again alleges that his rejection by respondent for admission (in 1979) to respondent's graduate school of arts & sciences was an abuse of discretion and discriminating. An Article 78 proceeding must be brought within four months of the final decision denying petitioner admission to the graduate school [CPLR 217]. Petitioner was informed, in 1978,

that no further applications by petitioner for admission would be considered. Petitioner cannot avoid the statute of limitations by renewing the same application each year. All other claims of petitioner which seek relief in the nature of mandamus are also denied. In order to be successful in such a proceeding as the one herein, petitioner must establish that respondent's actions were arbitrary or capricious. This he has been unable to do. "A court should refrain from interjecting its views within those delicate areas of school administration which relate to the eligibility of applicants and the determination of marking standards, unless a clear abuse of statutory authority or a practice of discrimination or gross error has been shown." [In Re Lesser (Board of Education of the City of New York), 18 AD 2d, 388, 391]. Petitioner

has shown no arbitrary, unfair or unreasonable conduct by respondent in denying him admission, nor has he shown any right to the references requested. Clearly, it is not within the power of respondent to require members of its faculty to give letters of reference.

Petitioner's only claim which appears not to be time barred is his claim alleging medical malpractice. That is a cause of action at law and not an Article 78 proceeding. The cause of action is severed from the remaining causes of action; is converted into a cause of action at law [CPLR 103(c)]; and the petitioner shall serve an amended complaint limited to that cause of action within 30 days after service of a judgment herein.

Settle judgment consistent with the foregoing.

Dated: October 15, 1979 /s/ MBS J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK,
SPECIAL TERM PART 1

at the Courthouse thereof,
60 Centre Street,
New York, New York, 10007.

Present:

HON. MARTIN B. STECHER

Justice.

In the matter of the application of

Robert Boris Beachboard

-against-

Columbia University

The following papers numbered 1 to

read on this motion referred.

No. 173 on Calendar of SEP 10 1979

	PAPERS NUMBERED
Filed - Order to Show Cause - and Affidavits Annexed	2 and 3
Affidavit of Service	1

See Motions 170, 171, 172, 168, 169, 83, 84, 47, 28 this date.

Upon the foregoing papers this motion is decided of in accordance with accompanying memorandum decision.

Dated 10/12/79 /s/ MBS

F I L E D
OCT 17 1979
NEW YORK
CO. CLERK'S OFFICE

At a Special Term, Part I, of the Supreme Court of the State of New York, held in the County of New York, at the County Court House thereof on the 5th day of December 1974.

PRESENT:

HON. MARTIN B. STECHER,

Justice.

----------X

In the Matter of the Application of

ROBERT BORIS BEACHBOARD,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

- against -

COLUMBIA UNIVERSITY,

Respondent.

Index No. 12669/79

ORDER/JUDGMENT

----------X

The application in the above entitled proceeding brought by petitioner appearing pro se pursuant to Article 78

of the Civil Practice Law and Rules for a judgment directing the respondent to enroll petitioner in a certified degree program in its Graduate School, compelling the respondent to change a grade given to petitioner, directing the respondent to provide petitioner with a letter of reference, damages for medical malpractice, etc. having duly come on to be heard before Mr. Justice Martin B. Stecher at a Special Term, Part I of this Court on the 26th day of September, 1979;

On reading and filing the order to show cause dated September 21, 1979, the petition verified September 21, 1979, and exhibits annexed thereto in support of the petition, and the affirmation of Byron Golden dated September 25, 1979 in opposition to the petition herein, and petitioner having appeared pro se herein, and Byron Golden, Esq. having appeared for

respondent herein, and due deliberation having been had, and upon the opinion of the Court, dated October 15, 1979,

Now, on motion of Byron Golden, attorney for the respondent, it is hereby

ORDERED, ADJUDGED AND DECREED that except with respect to petitioner's claim alleging medical malpractice, petitioner's application is denied and the proceeding is dismissed, and it is further

ORDERED, that petitioner's claim alleging medical malpractice is hereby severed and this proceeding is hereby converted into a cause of action at law, and it is further

ORDERED, that petitioner shall serve an amended complaint limited to the medical malpractice cause of action within thirty (30) days after service of notice of entry of this judgment.

E N T E R ,

/s/ MBS

NEW YORK SUPREME COURT

APPELLATE DIVISION:

FIRST DEPARTMENT

In the Matter of the Application of	:	
ROBERT BORIS BEACHBOARD,	:	
Petitioner-Appellant,	:	NOTICE OF APPEAL
For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules	:	
-against-	:	
COLUMBIA UNIVERSITY,	:	
Respondent-Appellee.	:	

PLEASE TAKE NOTICE that the above named appellant hereby appeals to the Court of Appeals from the order of the Appellate Division of the First Judicial Department signed on April 22, 1980 and designated as "M-1112" dismissing an

appeal of the appellant from an order/ judgment entered in the office of the Clerk of the County of New York on December 6, 1979.

June 2, 1980.

/s/ Robert Boris Beachboard
Robert Boris Beachboard
Appellant in Person
535 John Jay Hall
Columbia University
New York, New York
10027
Tel.: (212) 280-6045

To Byron Golden
Attorney for Appellee
11 East 44th Street
New York, New York
10017
Tel: (212) 687-3755

APPENDIX "2"

STATE OF NEW YORK

COURT OF APPEALS

[SEAL]

JOSEPH W. BELLACOSA
CLERK OF THE COURT

CLERK'S OFFICE
ALBANY 12207

July 15, 1980

Mr. Robert Boris Beachboard
John Jay Hall
Columbia University
New York, New York 10027

Re: Beachboard v. Columbia University

Dear Mr. Beachboard:

I acknowledge receipt of your 500.2 jurisdictional statement in connection with the above-entitled matter.

The Court may examine its subject matter jurisdiction sua sponte, with respect to whether the order appealed from is final (CPLR 5601).

This communication is without prejudice to any motion any party may wish to make. If you conclude that the order is not appealable as of right, please arrange for the execution of a stipulation consenting to a dismissal of the appeal and transmit that paper to my

office. If a stipulation is to be forthcoming, please inform me immediately.

On the other hand, if you wish to persist in the appeal, you are invited to present to the Court in writing within ten days of this letter's date your comments justifying the retention of subject matter jurisdiction. Your adversary is likewise afforded this opportunity.

Very truly yours,

/s/ Joseph W. Bellacosa

Joseph W. Bellacosa

EJM/cpw

cc: Byron Golden, Esq.

APPENDIX "3"

John Jay Hall
Columbia University
New York, New York
10027

July 31, 1980

Mr. Joseph W. Bellacosa
Clerk of the Court
Court of Appeals
Eagle Street
Albany, New York 12207

Re: Beachboard vs. Columbia University

Dear Mr. Bellacosa

Upon your invitation the finality of the order appealed from in this action entered in the Appellate Division of the First Judicial Department is herein upheld. Appellant relies upon Reynolds vs. Cropsey, 241 N.Y. 389 in which an order of the Appellate Division of the Second Judicial Department denying as a matter of law a motion for a writ of prohibition was deemed final. Also relevant is David Johnson, by his guardian, Walter Johnson, et al. vs. Yeshiva University et al.; Yeshiva University et al. vs. City of New York, 53 A.D.2 523 (1st J.D. 1976) in which the Appellate Division order dismissing the first six causes of the complaint was similarly determined to be final. The subject order in this action which is dated April 22, 1980 adheres to the definition of finality expressed in

C.P.L.R. § 5611 in that it "disposes of all the issues in the action."

The appellant hereby appeals to the Court of Appeals as of right pursuant to C.P.L.R. §5601 upon the constitutional grounds that due process of law has not been evident in the proceedings, appellant has been denied a day in court.

Sincerely,

/s/ Robert Boris Beachboard

Robert Boris Beachboard

cc: Byron Golden

APPENDIX "4"

COURT OF APPEALS OF THE
STATE OF NEW YORK
----------X

In the Matter of the Application of :

ROBERT BORIS BEACHBOARD, :

Petitioner-Appellant, : AFFIDAVIT IN SUPPORT OF MOTION

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules :

-against- :

COLUMBIA UNIVERSITY, :

Respondent-Respondent. :

----------X

STATE OF NEW YORK,
ss.:
COUNTY OF NEW YORK,

Robert Boris Beachboard, petitioner-appellant in the above-entitled proceeding, being duly sworn, deposes and says:

1. On July 8, 1980 your appellant

served on the respondent a jurisdictional statement required by rule 22A N.Y.C.R.R. § 500.2 of this court along with relevant exhibits. These are attached hereto as exhibit IV.

2. On July 15, 1980 the clerk of this Court, Joseph V. Bellacosa, wrote to the appellant in regard to the "finality" of the order from which appeal was being attempted at that time. This letter is attached as exhibit II.

3. On July 31, 1980 the appellant herein served upon the respondent a letter in which the finality of the subject order is demonstrated. This letter is attached hereto as exhibit III. No reply has ever been received to this letter.

4. On September 16, 1980 the clerk of this court dismissed the appeal of the petitioner-appellant from an order of the Appellate Division of the Supreme

Court of the State of New York, First Department to this Court upon the grounds of absence of constitutional questions involved therein. A copy of the order along with a preliminary note is found here as exhibit I.

5. Your appellant brings to the attention of this Court the wording of section fifty-two of the Judiciary Law of the State of New York: "A general rule or order of the court of appeals does not take effect until it has been published in the state bulletin ...."

6. The revision of 22A N.Y.C.R.R. § 500.3 which incorporated the sua sponte provision has not been published in the New York State Bulletin nor has it been published in the successor, New York State Register, as of its forty-second issue.

7. The clerk of this court does

not have legal authority to dismiss the subject appeal sua sponte upon the grounds of insufficient subject matter for jurisdiction.

WHEREFORE, the appellant respectfully requests that the order of Joseph V. Bellacosa made September 16, 1980 be vacated and that the appeal of the petitioner-appellant from an order of the Appellate Division of the Supreme Court of the State of New York, First Department dated April 22, 1980 be placed on the calendar of the next available term of this Court and that the appellant be granted such other and further relief as to the Court may seem just and proper.

Dated: October 27, 1980.

/s/ Robert Boris Beachboard
Robert Boris Beachboard

STATE OF NEW YORK,
ss.:
COUNTY OF NEW YORK,

Robert Boris Beachboard, being duly sworn, deposes and says that he is the named appellant in the above-entitled action; that he has read the foregoing affidavit in support of a motion and knows the contents thereof and that the same is true to his own knowledge, except as to matters therein stated to be alleged on information and belief, and as to those matters, he believes it to be true.

/s/ Robert Boris Beachboard
Robert Boris Beachboard

Subscribed and sworn to before me this twenty-seventh day of October, 1980.

GEORGE H. S. MA
Notary Public,
State of New York
No. 31-4715002
Qualified in
N. Y. County
Commission expires
March 30, 1982

/s/ George H. S. Ma
Notary Public
County of New York
State of New York

COURT OF APPEALS OF THE
STATE OF NEW YORK
----------X

In the Matter of the Application of :

ROBERT BORIS BEACHBOARD, :

Petitioner-Appellant, : NOTICE OF MOTION

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules :

-against-

COLUMBIA UNIVERSITY, :

Respondent-Respondent. :

----------X

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of Robert Boris Beachboard, sworn to the twenty-seventh day of October, 1980 along with its included exhibits, the brief and appendix of the appeal of this proceeding to this Court,

and the record of the lower court with its indexed copies filed with this Court, the petitioner-appellant will move at the Court of Appeals Hall on Eagle Street in Albany at two o'clock in the afternoon of the tenth day of November, 1980, or as soon thereafter as counsel can be heard, for an order vacating a sua sponte dismissal of said appeal upon the grounds that said dismissal does not have legal force in that the rules by which it was promulgated did not comply with section fifty-two of the Judiciary Law of the State of New York.

Dated: October 27, 1980.

/s/ Robert Boris Beachboard
Robert Boris Beachboard
511 West 112th Street
Room 545
New York, New York
10025
Tel.: (212) 662-1262
ex. 545

To: Byron Golden
Attorney for Respondent
11 East 44th Street
New York, New York
10017
Tel.: (212) 697-5755

STATE OF NEW YORK

COURT OF APPEALS

[SEAL]

JOSEPH W. BELLACOSA
CLERK OF THE COURT

CLERK'S OFFICE
ALBANY 12207

July 15, 1980

Mr. Robert Boris Beachboard
John Jay Hall
Columbia University
New York, New York 10027

Re; Beachboard v. Columbia University

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I acknowledge receipt of your 500.2 jurisdictional statement in connection with the above-entitled matter.

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This communication is without prejudice to any motion any party may wish to make. If you conclude that the order is not appealable as of right, please arrange for the execution of a stipulation consenting to a dismissal of the appeal and transmit that paper to my office. If a stipulation is to be forthcoming, please inform me immediately.

On the other hand, if you wish to

persist in the appeal, you are invited to present to the Court in writing within ten days of this letter's date your comments justifying the retention of subject matter jurisdiction. Your adversary is likewise afforded this opportunity.

Very truly yours,

/s/ Joseph W. Bellacosa

Joseph W. Bellacosa

EJM/cpw

cc: Byron Golden, Esq.

John Jay Hall
Columbia University
New York, New York
10027

July 31, 1980

Mr. Joseph V. Bellacosa
Clerk of the Court
Court of Appeals
Eagle Street
Albany, New York 12207

Re: Beachboard vs. Columbia University

Dear Mr. Bellacosa

Upon your invitation the finality of the order appealed from in this action entered in the Appellate Division of the First Judicial Department is herein upheld. Appellant relies upon Reynolds vs. Cropsey, 241 N.Y. 389 in which an order of the Appellate Division of the Second Judicial Department denying as a matter of law a motion for a writ of prohibition was deemed final. Also relevant is David Johnson, by his guardian, Walter Johnson, et al. vs. Yeshiva University et al.; Yeshiva University et al. vs. City of New York, 53 A.D.2 523 (1st J.D. 1976) in which the Appellate Division order dismissing the first six causes of the complaint was similarly determined to be final. The subject order in this action which is dated April 22, 1980 adheres to the definition of finality expressed in C.P.L.R., § 5611 in that it "disposes of all the issues in the action."

The appellant hereby appeals to the Court of Appeals as of right pursuant to C.P.L.R. §5601 upon the constitutional grounds that due process of law has not been evident in the proceedings, appellant has been denied a day in court.

Sincerely,

/s/ Robert Boris Beachboard

Robert Boris Beachboard

cc: Byron Golden